IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

WEDNESDAY, THE 7TH MARCH 2007 / 16TH PHALGUNA 1928

CRL.A.No. 1168 of 2002()

S.C.No.31/99 of ADDL. SESSIONS COURT, FAST TRACK (ADHOC-I), ALAPPUZHA.

APPELLANT: ACCUSED

VISWAMBARAN, VADEKKEKARAKIZAKETHIL,
PALLIKKAL VADEKEKARA MURI, PALAMEL VILLAGE.

BY ADV. SRI.R.KRISHNA RAJ

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY THE
EXCISE INSPECTOR, MAVELIKARA.

BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MUHAMMED.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M. JAMES, J.

Criminal Appeal No. 1168 of 2002

Dated this the 7th March, 2007.

J U D G M E N T

The accused in S.C.No.31/1999, on the file of the Additional Sessions Court, Fast Track, (Ad hoc-I), Alappuzha, is the appellant. He was found guilty under Section 55(a) of the Abkari Act, and, therefore, was convicted and sentenced thereunder to undergo rigorous imprisonment for a period of one year, and also to pay a fine of Rupees One Lakh, in default of payment of fine, to undergo rigorous imprisonment for a further period of six months. Hence, this appeal by the accused.

2. The brief facts required for the disposal of the appeal are that, PW.3, the Excise Inspector of Mavelikara Excise Range, along with the Preventive Officer of the same excise range were on patrol duty on 10.9.1997, at about 7.30 p.m. They found the accused coming from the opposite direction with M.O.1 plastic cannas. He was intercepted and searched. M.O.1 contained 1.350 litres of illicit arrack. He also possessed M.O.2 glass of 150 ml. capacity. PW.3 arrested the appellant and prepared Ext.P2 occurrence report. Ext.P3

mahazar was also prepared by PW.3. Section 161 Cr.P.C. statements of the excise officials and the other independent witnesses were also recorded, PW.2 being one of such independent witness. But during trial, the independent witness, PW.2, turned hostile. No other witness had been examined to prove Ext.P3 mahazar. However, the court below accepted the evidence of departmental witnesses, Pws.1 and 3, rejected the argument of the defence regarding the difference in the quantity of the sample recorded in Ext.P3 mahazar, sent the same for chemical analysis, and as per Ext.P4 chemical analysis report, convicted the accused, and sentenced him, as stated above.

3. PWs. 1 and 3, being the departmental witnesses and from the same excise range, and PW.2, the independent witness, being hostile, the other circumstances available on record will have to be appreciated. If the evidence of PWs. 1 and 3 are acceptable, then the conviction can be upheld. Therefore, I proceed further to examine the evidence of Pws.1 and 3, as well as Ext.P4 chemical analysis report, in the light of the non-examination of any of the independent witnesses recorded in Ext.P3 mahazar.

4. It is admitted by the prosecution that PW.3 arrested the appellant, seized the contraband, took the specimen for sample to be sent for chemical analysis, kept it under his custody till it was sent to the court, and, therefore, it is for the prosecution to establish that he did it according to the law. Whether this conduct of PW.3 is to be accepted is the next question.

5. The defence pointed out relying on Ext.P4 that the specimen sent for chemical analysis was 180 ml. of clear colourless liquid alleged to be arrack. The report reveal that it contained Ethyl Alcohol of 33.72 percentage by volume. In Ext.P3, as well as in the evidence of Pws.1 and 3, it is brought out that they took the sample of 150 ml. There is no explanation available how the sample of 180 ml. was sent for chemical analysis. The Prosecutor argued that the sending of 180 ml. may be the correct version, and in the records, it may have been recorded as 150 ml. The lower court also accepted this version. I ought to have accepted this version, provided, other circumstances available are corroborating the evidence of Pws.1 and 3. The sample was taken and it was kept under the custody of PW.3. No independent witness had been examined, as to who affixed the signature on the sample. Therefore, at what stage the sample was

sealed is not available before this Court. Merely because the seal was intact, it cannot be said that sealing was done on the sample, at the time of its seizure, in the presence of the accused. The sample also cannot be taken as an authoritative sample. Therefore, I am of the opinion that the sample of 150 ml. taken was not sent, but the sample of 180 ml. which was sent, is not from the material that had been seized from the possession of the accused.

6. The sentence prescribed under the Abkari Act is rigorous. Therefore, there must be clear proof adduced by the prosecution against the accused. I have posted this matter repeatedly on different occasions, and there was no representation. Hence, the appeal was posted for disposal. Today also, there is no representation from the appellant. I have, therefore, gone through the records and apprecited the whole matter. I find that the conviction and sentence passed by the court below are not sustainable for the reasons discussed above. When evidence is adduced through the departmental witnesses alone, the court must be more cautious in entering into a conviction. In the circumstances mentioned above, the conviction and sentence passed by the lower court is only to be set aside.

7. In the result, the appeal is allowed. The conviction and sentence passed in S.C.No.31/1999 by the Additional Sessions Court, Fast Track, (Ad hoc-I), Alappuzha, is set aside. The appellant, accused, is set at liberty forthwith cancelling his bail bond.

J.M. JAMES,
JUDGE

nj.

J.M. JAMES, J.

Criminal Appeal No.1168 of 2002

J U D G M E N T

Dated: 7th March, 2007.